83-722

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

in the Supreme Court of the United States

ORVILLE MEYER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PAUL MORRIS
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Counsel for Orville Meyer

QUESTION PRESENTED

Whether the "law of the case" doctrine can deprive an accused of his Fourth and Fifth Amendment rights to testify in support of his claim of standing to challenge a search and seizure where:

(1) at the motion to suppress hearing, the Magistrate informs the accused at the outset that he will be afforded an opportunity to testify if standing is not found at the conclusion of the hearing;

(2) the Magistrate finds standing, the district court agrees, and the accused therefore does not offer his testimony in support of standing;

(3) the government appeals the order of suppression and wins on the ground that standing was not established;

(4) following reversal, the district court, in violation of the Magistrate's representation to the accused that he would be allowed to testify to establish standing in the event standing were not found, refuses to allow the accused to testify to prove standing based upon "law of the case";

(5) upon appeal from his conviction, the panel agrees that the "law of the case" doctrine precludes the accused from proving standing, although he was never fairly afforded that opportunity, and was led to believe by the Magistrate that if standing were not found, he would be allowed to testify.

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___ F. 2d ___ (11th Cir. 1983)
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White v. Murtha,
377 F.2d 428 (5th Cir. 1967) .....

JUDGMENT AND OPINION OF THE COURT BELOW

On July 8, 1983, the United States Court of Appeals for the Eleventh Circuit filed an eight-page unpublished opinion affirming the convictions of the Petitioner. (App. 1-6) On September 1, 1983, the Eleventh Circuit entered an order denying the timely filed Petition for Rehearing. (App. 7-8)

JURISDICTION OF THIS COURT

This Petition is filed within sixty days of the Court of Appeals denial of the Petitioner's petition for rehearing on September 1, 1983.

The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C. § 1254(1) and Rules 17 through 23 of this Court's rules.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourth and Fifth Amendments to the Constitution.

STATEMENT OF THE CASE

On August 12, 1980, a hearing on the defendant's motion to suppress evidence was conducted before United States Magistrate Patricia Kyle in the United States District Court for the Southern District of Florida. Petitioner Meyer sought to suppress cocaine hidden in the apartment of one Steven Hodlow.

The government raised as a preliminary matter the issue of Meyer's standing to challenge the search and seizure. The Magistrate ruled that Meyer would not have to prove standing unless after the hearing, standing appeared to be at issue, in which event, *Meyer would be afforded the opportunity to testify*. (App.11)

Ultimately, Meyer did not testify as to standing because after presiding over the hearing on the motion to suppress, the Magistrate recommended suppression, finding specifically that Meyer had standing to challenge the search and seizure, and that the government had failed in its burden of proving the legality of the warrantless arrest, search and seizure.

The District Court, Judge Norman Roettger, agreed with the Magistrate and ordered suppression.

The government appealed the order of suppression on the ground that Meyer had failed to prove standing. The order of suppression was reversed. *United States v. Meyer*, 656 F. 2d 979 (5th Cir., Unit B, 1981).

Upon remand to the trial court, counsel for Meyer moved the District Court in writing and orally for a hearing on the motion to suppress in order to establish standing. Judge Roettger denied the motions.

The cause proceeded to jury trial. Meyer was convicted of conspiracy to possess with intent to distribute cocaine in Count I,

possession with intent to distribute cocaine in Count 2, distribution of cocaine in Count 3, and use of communication facility in the causation of a felony in Count 4; Meyer was committed to the custody of the Attorney General for treatment and supervision pursuant to the Youth Corrections Act on April 20, 1982. A timely appeal was taken to the Eleventh Circuit.

On appeal from the convictions, the panel affirmed in an unpublished opinion, rejecting Meyer's claim that he should have been afforded an opportunity to testify to prove standing. *United States v. Meyer*, ____ F.2d ____ (11th Cir. 1983) (Case No. 82-5397, opinion filed July 8, 1983). (App. 1-6).

Rehearing and rehearing en banc were sought. Denial was filed on September 1, 1983. (App. 7-8).

REASONS FOR GRANTING THE WRIT

A precedent setting error of exceptional importance has been committed in this case which has resulted in the deprivation of the Petitioner's fundamental due process Fifth Amendment right to be heard in court. In brief, the Petitioner was never afforded an opportunity to prove, through his testimony, that he had standing to challenge the search and seizure in question. The facts that gave rise to this claim have been recounted and are expounded upon as follows.

On August 12, 1980, a hearing on a motion to suppress was heard before the Honorable Patricia Kyle, United States Magistrate of the United States District Court, Southern District of Florida, Fort Lauderdale, Florida. The government raised as a preliminary matter the issue of the appellant's standing to challenge the search and seizure because the events occurred in the residence of a third party. At the *commencement* of the

hearing, the magistrate stated that if after the hearing, she were of the opinion that Meyer did not have standing, he would then have the opportunity to testify to prove standing:

> THE MAGISTRATE: [W]hen this is all over, if I believe that Mr. Meyer does not have standing in all or part of, I am going to give Mr. Sanford [counsel for Meyer] notice of that effect and, that, at that time if he wishes to bring Mr. Meyer forward to allow Mr. Meyer to testify and establish his standing, I will permit him to do so.

(App. 11) (Mr. Sanford did call Mr. Meyer to testify at the hearing, but for impeachment of a tangential issue, not as to standing, for the obvious reason that there was no such need, given the Magistrate's ruling.)

After the hearing on the motion to suppress, the Magistrate recommended that the evidence against Meyer be suppressed, finding specifically that Meyer had standing to challenge the search and seizure. The District Court, Judge Norman Roettger, agreed and ordered suppression. Thus, Meyer never testified to establish his standing.

Nevertheless, the government appealed, contending that Meyer had no standing. The order of suppression was reversed. *United States v. Meyer*, 656 F.2d 979 (5th Cir., Unit B, 1981).

Following the reversal, Meyer's counsel sought, by written and oral motion, the opportunity Meyer never had, namely to testify to those facts never adduced which would establish standing. Trial counsel brought to the attention of the district judge the ruling of the Magistrate. The trial court denied Meyer's request to testify on the ground that the reversal of the order of suppression was the "law of the case" and that he was bound by the reversal and not bound by the ruling of the Magistrate.

Thereafter, Meyer was jointly tried with co-defendant McMahon and was found guilty of conspiracy to possess and distribute cocaine, possession with intent to distribute cocaine, distribution of cocaine, and use of a communication facility in the commission of a felony. On appeal, Meyer raised as error the trial court's refusal to allow him to testify to establish standing.

On July 8, 1983, a panel of the Eleventh Circuit rejected the claim as follows:

> Appellants' second contention is that the district court erred when it failed to give them an opportunity to present evidence to establish their standing to challenge the constitutionality of a search of co-defendant Hodlow's apartment and the seizure of a kilogram of cocaine. The district judge declined to conduct a hearing on the standing issue because he believed the former Fifth Circuit had already determined that appellants lacked standing to make a Fourth Amendment challenge. Our review of the record indicates that the district judge was correct. In *United States v. Meyer, supra,* the former Fifth Circuit stated:
>
> > The issue on appeal is whether defendants had a legitimate expectation of privacy in the area where the cocaine was seized, entitling them to challenge the legality of the search and seizure. We hold they did not have this expectation, and reverse the district court order which granted their motions to suppress.
>
> 656 F.2d at 980.
>
> Appellants attempt to circumvent the former Fifth Circuit's holding by arguing that they did not have a full opportunity to present evidence of standing at the original suppression hearing and, therefore, that they should have been allowed to present *additional* evidence on the standing issue. The difficulty with this argument is that it was made

> and rejected on the previous appeal. In their reply brief, appellants note that in the prior appeal they argued that "even if standing had not been established, the defendants were entitled to prove standing at a new evidentiary hearing" in the district court. The former Fifth Circuit implicitly rejected this argument because, rather than remanding for a new evidentiary hearing, the court held that defendants had failed to establish an expectation of privacy in the area where the cocaine was seized and reversed the suppression order. 656 F.2d at 980-82. Thus, the district court correctly applied the "law of the case" doctrine, *see White v. Murtha*, 377 F.2d 428 (5th Cir. 1967) (footnote omitted), when it concluded that appellants should be permitted to *relitigate* the standing issue.

(Slip opinion at 4—5. Emphasis supplied.)

The emphasized portions of the panel's decision reflect a fundamental misconception. Petitioner Meyer never sought an opportunity to present *additional* evidence or *relitigate* the standing issue because the issue was never litigated *ab initio*. From this flawed premise flows the erroneous application of the "law of the case" doctrine.

The panel opinion's reliance upon *White v. Murtha, supra*, to defeat the opportunity of Meyer to testify is misplaced and turns the "law of the case" doctrine on its head. *Murtha* actually supports the Petitioner's right to testify. *Murtha* states the general definition of "law of the case" as a rule predicated upon the principle that litigation should come to an end. "[I]t would be impossible for an appellate court 'to perform its duties satisfactorily and efficiently' and expeditiously 'if a question, once considered and decided by it were to be litigated *anew* in the same case upon any and every subsequent appeal' thereof." 377 F.2d at 428. [Citations omitted; emphasis supplied]. "Law of the case" cannot bar the Petitioner's right to be heard in court because he has never sought to litigate *anew*. Rather, Meyer seeks a primary opportunity.

Additionally, even the *Murtha* case recognizes that the doctrine is not an "inexorable command", 377 F.2d at 431, and the doctrine is *not* to be applied where it would "work a manifest injustice." 377 F.2d at 432.

The manifest injustice apparent here is of *constitutional magnitude* because Meyer was deprived of his due process right to be heard in violation of the Fifth Amendment. That violation, in turn, effectively negated his right to contest a Fourth Amendment violation.

This Court has recognized that a state prisoner's right to a full and fair opportunity to litigate a Fourth Amendment claim is so fundamental that it is the *only* claim that can be made in a federal habeas corpis action seeking redress for a Fourth Amendment violation. *Stone v. Powell*, 428 U.S. 465, 96 S. Ct. 3037, 49 L.Ed.2d 1067 (1976). *A fortiori*, an accused in federal court such as Meyer, who is deprived of the full and fair opportunity to litigate his Fourth Amendment claim, must be afforded relief.

This proceeding is the only available vehicle for the redress of the Petitioner's claim and for the prevention of its recurrence in future cases. It is of no consolation to the Petitioner that the panel decision has now informed him that the original panel "implicitly" held that he was not entitled to litigate his claim because the reversal did not specify reversal and remand for a new suppression hearing. And that "after-the-fact" notice to the Petitioner cannot be squared with fundamental notions of due process. The "reversal" did not so limit itself expressly, and even if it had, it should now be corrected for the Petitioner and future litigants whose right to testify is deprived through good faith reliance upon the representations of the judiciary.

Meyer was correct in assuming that the government would be estopped from denying him the opportunity to testify given that the Magistrate told him he did not have to testify because his

standing to challenge the search and seizure was without dispute, and the district judge agreed.

Without Meyer's testimony, it cannot be fairly stated that he could not, under any circumstances, have established standing, and the opinion below and the original appellate opinion never suggested same. Standing to challenge a search and seizure of a third party's premises has been recognized in the Eleventh Circuit. *See e.g., United States v. Torres,* ___ F.2d ___ (11th Cir. 1983) (Case No. 81-5827, opinion filed May 5, 1983), and cases cited therein.

The misapplication of the "law of the case" doctrine in this cause has set a dangerous precedent. An accused may now be informed that standing has been found by the lower court and that there is no need for his testimony on the issue. Relying upon same, the accused properly does not testify. The government may appeal, prevail, and then bar the accused from testifying to prove standing. There is no reason why this precedent would not extend beyond the parameters of this case to work miscarriages of justice in other criminal or civil proceedings. A litigant must be able to rely upon the representations and findings of magistrates and district courts without fear of losing on appeal and being forever barred from litigating good faith claims by virtue of his reliance upon those representations.

By not affording Petitioner Meyer a remand for a suppression hearing where all of the relevant facts could be developed, and where the lack of developed facts was due to the initial finding of the Magistrate and was in no way attributable to the defendant, this case is in clear conflict with *Combs v. United States,* 408 U.S. 224, 92 S.Ct. 2284, 33 L.Ed.2d 308 (1972) (because the record was virtually barren of the facts necessary to determine the defendant's right to contest the search and seizure, the United States Supreme Court remanded the case for further proceedings). It might also be noted that the case has resulted in intra-district conflict with *United States v. Bachner,* ___ F.2d

____ (11th Cir. 1983) (Case No. 81-6203), opinion filed June 6, 1983) (suppression order vacated on appeal by the government where the record was incomplete because relevant evidence was excluded, and the exclusion was not attributable to the government). Meyer should be afforded the same opportunity that was afforded the government in *Bachner*.

CONCLUSION

The Petitioner requests that certiorari be granted, his convictions be vacated, and this cause remanded to the trial court for a hearing on the motion to suppress, affording the Petitioner an opportunity to testify and prove standing, consistent with the Fourth and Fifth Amendments to the Constitution of the United States.

Respectfully submitted,

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Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 82-5397
NON-ARGUMENT CALENDAR

UNITED STATES OF AMERICA
Plaintiff-Appelle,

v.

WALTER McMAHON AND
ORLVILLE MEYER,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida.

REHEARING AND REHEARING EN BANC
Denied Sept. 1, 1983

Before RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

Appellants, Elton Orville Meyer and Walter McMahon, seek review of their convictions for conspiracy to possess and distribute cocaine, possession with intent to distribute cocaine, distribution of cocaine and, in Meyer's case, use of a communication facility in the commission of a felony. [1] We affirm.

The basic facts of this case are set out in *United States v. Meyer*, 656 F.2d 979 (5th Cir. Sept. 21, 1981). That decision of the former Fifth Circuit reversed the district court's order suppressing certain evidence against appellants. On remand, appellants were convicted in a jury trial. In this appeal from those convictions, appellants raise four contentions.

[1,2] Appellant's first contention can be disposed of rather easily. Although appellants argue that the district court erred in failing to charge the jury that it should consider evidence of a witness's mental condition in judging the credibility of his testimony, a review of the record indicates that appellants did not request such an instruction and made no objection to the instructions the court actually gave regarding the credibility of witnesses. Under Fed.R.Crim.P. 30, objections to jury instructions which are not timely made are waived unless the

FOOTNOTES:

1. One of appellants' co-defendants, Joe E. Abbott, was convicted in a separate proceeding, and the conviction was affirmed on appeal. *United States v. Abbott*, 665 F.2d 353 (11th Cir. 1981). The government apparently dismissed the charges against another co-defendant, Steven Hodlow.

2. In *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33 (11th Cir.1982), this court adopted as binding precedent all of the post-September 30, 1981, decisions of Unit B of the former Fifth Circuit. *Id.* at 34.

instruction consistutes "plain error." *United States v. Thevis*, 665 F.2d 616, 65 (5th Cir.) (Unit B), *cert. denied*, ____ U.S. ____, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982).[2] A jury charge constitutes "plain error" only if the charge, considered as a whole, is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or to seriously affect the fairness, integrity or public reputation of judicial proceedings. *Id.* Appellants have not contended, nor could they reasonably contend, that the district court's failure to give the instruction that they now request constituted "plain error" under this standard. The district court gave standard instructions regarding the credibility and impeachment of witnesses, informing the jury that it was the sole judge of the credibility of each witness's testimony whatever weight it thought the testimony deserved. Even assuming *arguendo* that the court erred by not elaborating on these instructions, the court's charge certainly was not so erroneous as to result in a miscarriage of justice or to adversly affect judicial proceedings. Accordingly, we reject appellants' challenge to the jury instructions.

Appellants' second contention is that the district court erred when it failed to give them an opportunity to present evidence to establish their standing to challenge the constitutionality of a search of co-defendant Hodlow's apartment and the seizure of a kilogram of cocaine. The district judge declined to conduct a hearing on the standing issue because he believed the former Fifth Circuit had already determined that appellants lacked standing to make a Fourth Amendment challenge. Our review of the record indicates that the district judge was correct. In *United States v. Meyer, supra*, the former Fifth Circuit stated:

> The issue on appeal is whether defendants had a legitimate expectation of privacy in the area where the cocaine was seized, entitling them to challenge the legality of the search and seizure. We hold they did not have this expectation, and reverse the district court order which granted their motions to suppress.

656 F.2d at 980.

[3] Appellants attempt to circumvent the former Fifth Circuit's holding by arguing that they did not have a full opportunity to present evidence of standing at the original suppression hearing and, therefore, that they should have been allowed to present addidional evidence on the standing issue. The difficulty with this argument is that it was made and rejected on the previous appeal. In their reply brief, appellants note that in the prior appeal they argued that "even if standing had not been established, the defendants were entitled to prove standing at a new evidentiary hearing" in the district court. The former Fifth Circuit implicitly rejected this argument because, rather than remanding for a new evidentiary hearing, the court held that defendants had failed to establish an expectation of privacy in the area where the cocaine was seized and reversed the suppression order. 656 F.2d at 980-82. Thus, the district court correctly applied the "law of the case" doctrine, *see White v. Murtha*, 377 F.2d 428 (5th Cir. 1967),[3] when it concluded that appellants should not be permitted to relitigate the standing issue.

Appellants' final two contentions relate to psychiatric reports prepared by two doctors who had examined the government's key witness, former DEA Agent Marshall. At the outset of the trial, appellants' counsel asked for copies of the reports. The prosecuting attorney did not have copies of the reports in his case file, and the trial judge decided to proceed with the trial rather than wait until appellants could obtain copies of the reports. Appellants now argue that the government's failure to provide them with copies of the psychiatric reports violated *Brady v. Maryland*, 373 U.S. 83, 86, 83 S.Ct. 1194, 1196, 10 L.Ed. 2d 215 (1963), and also deprived them of their Sixth Amendment right to confront and cross-examine witnesses.

3. In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc) the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

[4] "To establish a violation of *Brady* . . ., the appellants must demonstrate (1) that the prosecution suppressed evidence (2) that was favorable to the appellants or exculpatory and (3) that the evidence was material . . . If the defense makes a specific request for material that is suppressed the standard of materiality is whether the suppressed evidence might have affected the outcome of the case." *United States v. Blasco*, 702 F.2d 1315, 1327 (11th Cir.1983) (citations omitted). Even if we assume, *arguendo*, that the government suppressed evidence which was favorable to appellants, we cannot conclude that appellants have demonstrated that the psychiatric reports constituted *material* evidence. On cross-examination at trial, Marshall testified that he had received a 40% psychiatric disability retirement from the government, that within two weeks of the events which led to this case he had been the subject of two internal DEA investigations which concerned accusations that he had made obscene phone calls and had maliciously destroyed another person's automobile, that he had been diagnosed as having a sociopathic personality with destructive and self-destructive tendencies, that a person with such a personality has difficulty dealing with authority, and that prior to the events which led to this case he had been under a great deal of personal stress and had been taking valium for several years. Obviously, appellants had an ample opportunity to attack the crediblity of Marshall's testimony, and there is no indication in the record that this attack would have been strengthened if appellants had been given copies of the psychiatric reports they sought. Under these circumstances, we have no reason to believe that disclosure of the psychiatric reports would have affected the outcome of the case. Thus, appellants have not established a *Brady* violation because they have failed to demonstrate the materiality of the evidence which the government allegedly suppressed.

Morever, "the government is not obliged under *Brady* to furnish a defendant with information which he already has or, with any reasonable diligence, he can obtain himself." *United States v. Prior*, 546 F2d 1254, 1259 (5th Cir. 1977). *See also, e.g., United States v. Brown*, 628 F.2d 471, 474 (5th Cir. 1980) ("In no way can information known and available to the defendant be said to have been suppressed by the Government.") Appellants' counsel knew, or should have known, about the two psychiatric reports long before the day of trial because the existence of the reports was revealed at the trial of appellants' co-defendant, Abbott. *See United States v. Abbott*, 665 F.2d 353 (11th Cir. 1981). Had they exercised reasonable diligence, appellants' counsel could have contacted the doctors who prepared the reports, just as Abbott's attorney did,[4] and obtained any relevant information or called them as witnesses. Consequently, appellants' *Brady* claim is without merit.[5]

[5] Similarly, appellants' Sixth Amendment Confrontation Clause claim lacks merit. As noted above, the record simply does not support appellants' contention that without the psychiatric reports they were unable to cross-examine Marshall effectively. *Cf. United States v. Abbott, supra* (rejecting a similar challenge made by co-defendant Abbott regarding the "limitations" on cross-examination at his trial).

The judgment of the district court is AFFIRMED.

4. Abbott's attorney not only obtained copies of the reports, but also talked with at least one of the doctors who had examined Marshall. *United States v. Abbott, supra.* Nevertheless, Abbott's attorney "declined to call either doctor as a witness," *id.*, a fact which supports our conclusion above that appellants have not demonstated that disclosure of the reports would have affected the outcome of the case.

5. The trial judge summarized the facts succinctly during a colloquy at trial when he made the following statement to one of appellants' attorneys: "You don't have the reports in your file to cross-examine him on because you haven't done anything for two months." Record on Appeal, vol. 3, at 106.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 82-5397

UNITED STATES OF AMERICAN,
Plaintiff-Appellee,

versus

WALTER McMAHON and
ORVILLE MEYER,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 8, 11 Cir., 1983, ____ F.2d ____).

Before RONEY, VANCE and ANDERSON, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ _____
United States Circuit Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE, FLORIDA

NO. 80-214-CR-NCR

UNITED STATES OF AMERICA,

Plaintiff,

vs

JOSEPH ELLINGTON ABBOTT,
ORVILLE ELTON MEYER,
STEVEN MARION HODLOW,
WALTER McMAHON

Defendants.

The above-entitled cause came on for hearing on Motion to Suppress before The Honorable PATRICIA JEAN KYLE, United States Magistrate, pursuant to notice.

UNITED STATES COURTHOUSE

United States Courthouse,
299 East Broward Boulevard,
Fort Lauderdale, FLorida,
August 2, 1980,
12:00 o'clock Noon.

APPEARANCES:

ATLEE W. WAMPLER, III, United States Attorney, by STEPHEN GILLMAN, Assistant United States Attorney, appearing on behalf of the Plaintiff.

JEROME SANFORD, ESQ.,
appearing on behalf of the Defendants, Abbott and Meyer.

BRUCE FLEISHER, ESQ.
appearing on behalf of the Defendant, Hodlow.

Government has not responded to any motions to suppress by statement of facts or otherwise. So, I am unfamiliar with the Government's position.

MR. GILLMAN: I would point out for the Court's benefit that we were served with copies of these on Friday.

THE COURT: Well, you got them before I did.

MR. GILLMAN: We got them on Friday, Your Honor, and it was simply impossible to respond in a written form by today.

THE COURT: I understand that. I'm trying to give everyone the benefit of a maximum amount of participation, both the Government, as well as the Defendant. Obviously, when this is all over, if I believe that *Mr. Meyer does not have standing in all or part of, I am going to give Mr. Sanford notice of that effect and, then, at that time if he wishes to bring Mr. Meyer forward to allow Mr. Meyer to testify and establish his standing, I will permit him to do so.*

MR. GILLMAN: Your Honor, my point is at the present time, based on the record before the Court, there is absolutely no indication as to why Mr. Meyer was in the apartment. For all the Court knows, he could have been a burglar that was in

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CLERK

No. 83-722

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ORVILLE MEYER,
Petitioner

vs.

UNITED STATES OF AMERICA,
Respondent

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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UNITED STATES of America,
Plaintiff-Appellant,

v.

Elton Orville MEYER and Walter McMahon, Defendenta-Appellees.

No. 80-5649.

United States Court of Appeals,
Fifth Circuit.

Unit B

Sept. 21, 1981

Stephen B. Gillman, Asst. U.S. Atty., Miami, Fla., for plaintififf-appellant.

Stephen Rosen, Paul Morris, Miami, Fla., for Meyer.

Angus M. Stephens, Coral Gables, Fla., for McMahon.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY, VANCE and RANDALL, Circuit Judges.

RONEY, Circuit Judge:

Federal drug enforcement agents, searching a Miami apartment, seized cocaine hidden in a bathroom cabinet. Defendants, who were in the apartment at the time as guests of the tenant, were indicted for violating federal narcotics laws in connection with the cocaine. The issue on appeal is whether defendants had a legitimate expectation of privacy in the area where the cocaine was seized, entitling them to challenge the legality of the search and seizure. We hold they did not have this expectation, and reverse the district court order which granted their motions to suppress.

The material facts, developed through testimony at a suppression hearing, are as follows. Agent James Marshall of the Drug Enforcement Administration (DEA) commenced an undercover operation in April 1980. Marshall allegedly arranged a cocaine transaction with Orville Meyer and Joe Abbott.

On the evening of April 23, Marshall and Meyer went to an apartment rented by Steven Hodlow, who lived there with his wife and child. Hodlow was not home at the time, but his wife invited the pair in and then immediately left with the child. Hodlow arrived about thirty minutes later with Walter McMahon. The four remained in the apartment for approximately fifteen minutes, allegedly to complete the drug transaction. Agent Marshall and Hodlow then departed, leaving Meyer and McMahon alone briefly in the apartment.

Surveilling DEA agents, acting upon Marshall's statement there was cocaine inside, sought entry into the apartment by knocking and announcing their presence. When there was no response, they forced the locked door open. The agents found Meyer lying spread-eagled on the living room floor and McMahon barricaded behind an upturned bed in one of the bedrooms.

In response to questioning by one of the agents, McMahon indicated the cocaine was in one of the bathrooms. Finding nothing, the agent conducting the search again asked McMahon, who responded the drugs were in the cabinet under the sink. The agent opened the cabinet and removed a cardboard box containing approximately one kilogram (2.2 pounds) of cocaine.

Meyer and McMahon were indicted along with Hodlow and Abbott for possession and distribution of cocaine, as well as for conspiracy to possess with intent to distribute.21 U.S.C.A. §§ 841(a)(1); 846. Hodlow and Abbott are not parties to this appeal.

Meyer and McMahon filed motions to suppress. The district court, adopting the magistrate's report, held they had "standing" to challenge the seizure of the cocaine, apparently because both were involved in the drug conspiracy and were present in the apartment with the tenant's permission. Approving the magistrate's finding of an illegal warrantless search of the bathroom cabinet, the court granted the motions. The Government appeals the suppression order.

The Government challenges only the district court's holding that Meyer and McMahon had standing to contest the search, and does not dispute the finding of an unlawful search. Accordingly, we assume for purposes of this decision that the search of the bathroom cabinet and seizure of the cocaine were illegal.

To invoke the exclusionary rule, a defendant must establish that his own Fourth Amendment rights were violated by an unlawful search and seizure. Attempts to vicariously assert violations of the Fourth Amendment rights of others have been repeatedly rejected. *See, e.g., United States v. Salvucci*, 448 U.S. 83, 86, 100 S.O. 2547, 2550, 65 L.Ed.2d 619 (1980); *Rakas v. Illinois*, 439 U.S. 128, 134, 99 S.Ct. 421, 426, 59 L.Ed.2d 387 (1978); *Alderman v. United States*, 394 U.S. 165, 174, 89 S.Ct. 961, 986, 22 L.Ed.2d 176 (1969). *See also United States v. Vicknair*, 610 F.2d 372, 377 (5th Cir. 1980), *cert. denied*, 449 U.S. 823, 101 S.Ct. 83, 66 L.Ed.2d 25 (1981); *United States v. Byers*, 600 F.2d 1130, 1132 (5th Cir. 1979).

Whether a defendant's Fourth Amendment rights have been violated by an unlawful search turns on his "legitimate expectation of privacy" in the area searched. *Rakas v. Illinois*, 439 U.S. at 143, 99 S.Ct. at 430. While an ownership or possessory interest is not necessarily required, the mere legitimate presence on the searched premises by invitation or otherwise, is insufficient in itself to create a protectable expectation. *Id.* at 14243, 99 S.Ct. at 429-30. *See also Vicknair, supra*, 610 F.2d at 379.

A defendant must also establish a legitimate expectation of privacy in the *particular area* searched in order for a Fourth Amendment challenge to be allowed. With respect to the automobile search challenged in *Rakas*, the Court stated:

> [*T*]he fact that [*defendants*] were 'legitimately on the premises' in the sense that they were in the car with the permission of its owner is not determinative of ***whether they had a legitimate expectation of privacy in the particular areas of the automobile searched.*** **[Defendants] made no showing that they had any expectation of privacy in the glove compartment or area under the seat of the car in which they were merely passengers. Like the trunk of an automobile, these are areas in which a passenger *qua* passenger simply would not normally have a legitimate expectation of privacy.**

439 U.S. at 149-49, 99 S.Ct. at 433 (emphasis supplied). In illustrative dictum, the Court extended this analysis to dwellings, noting a "casual visitor who has never seen, or been permitted to visit, the basement of another's house [may not] object to a search of the basement if the visitor happened to be in the kitchen of the house at the time of the search." *Id.* at 142, 99 S.Ct. at 430.

We need not decide whether defendants in this case had a legitimate expectation of privacy in the living room and bedrooms, although it appears doubtful their presence in the apartment for less than an hour created such an expectation. *Compare United States v. Robertson*, 606 F.2d 853, 858 n.2 (9th Cir. 1979) (defendant may challenge the search of a house belonging to another, where he has spent at least one night there and has stored personal belongings in the room searched), *with United States v. Reyes*, 595 F.2d 275, 278-79 (5th Cir. 1979) (defendants who were mere passengers in a private aircraft had an insufficient expectation of privacy to object to its search). It is sufficient to conclude that defendants had no such expectation in the bathroom cabinet.

Like the ares of the automobile discussed in *Rakas*, bathroom cabinets are not areas of a dwelling in which visitors normally have any expectation of privacy. Defendants do not allege they either placed the cocaine in the cabinet or even entered the bathroom in which it was discovered. Meyer testified that he had only entered the living room and master bedroom, and that McMahon had in addition entered only the second bedroom. McMahon did not testify. Under these circumstances, defendants have shown no basis for asserting any reasonable expectation of privacy in a cabinet in a room they do not allege to have entered.

This case is distinguishable from *United States v. Haydel*, 649 F.2d 1152 (5th Cir. 1981), in which this Court held the defendant had a legitimate expectation of privacy in gambling records secreted in his parents' home under their bed. The Court relied on the following factors in reaching its conclusion: (1) defendant's parents had given him permission to use their home and and had also given him a key, thus giving him "unencumbered access;" (2) he kept clothing there and occasionally remained overnight; (3) he conducted his gambling activities at the home and owned the records seized; and (4) he exhibited a subjective expectation that the contents of the box in which the records were kept to remain private. 649 F.2d at 1154.

None of these factors is present here. Defendants have not alleged they either had a key to Hodlow's apartment or otherwise had "unencumbered access." They also have not indicated they ever remained in the apartment overnight or kept any personal belongings there. They were not related to the Hodlows. Finally, while defendants claim they obviously intended their alleged drug transaction to remain private, the Supreme Court expressly held in *Rakas* that the "subjective expectation of not being discovered" conducting criminal activities is insufficient to create a legitimate expectation of privacy. 439 U.S. at 143-44 n.12, 99 S.Ct. at 430-31 n.12. *See also Vicknair*, 610 F.2d at 379 ("The fact that defendants were associated together in an illegal enterprise does not alter the focus of our inquiry [as to their reasonable expectation of privacy]").

We hold defendants failed to bear their burden of proof of establishing a legitimate expectation of privacy in the area where the cocaine was seized. *See Rakas v. Illinois*, 439 U.S. at 130-31 n.1, 99 S.Ct. at 423-24 n.1. Accordingly, the order granting the motions to suppress is reversed.

REVERSED.

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No. 83-722

In the Supreme Court of the United States

OCTOBER TERM, 1983

ORVILLE MEYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the courts below improperly applied the "law of the case" doctrine to bar him from introducing additional evidence, after a suppression ruling in his favor was reversed, to show that he had "standing" to litigate a motion to suppress evidence.

1. Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); one count of distributing cocaine, in violation of 21 U.S.C. 841(a)(1); one count of conspiring to commit those offenses, in violation of 21 U.S.C. 846; and one count of using a communication facility in the commission of those offenses, in violation

of 21 U.S.C. 843(b).[1] He was sentenced to an indefinite commitment pursuant to the Youth Corrections Act, 18 U.S.C. 5010. The court of appeals affirmed (Pet. App. 1-6).

a. The evidence at trial, the sufficiency of which is not challenged here, showed that in April 1980 petitioner, along with co-defendants Walter McMahon and Joe Abbott, conspired to sell more than two pounds of cocaine. Their scheme was frustrated when their purchaser turned out to be an undercover agent of the Drug Enforcement Agency.

On the evening of April 22, 1980, DEA Agent James Marshall, acting in an undercover capacity, met with petitioner, Abbott, and a confidential informant who had arranged the meeting. Negotiations for the sale of drugs ensued. It was ultimately agreed that petitioner and Abbott would sell two kilograms of cocaine to Marshall (Tr. 60-66, 119). Abbott said that he would call Marshall the next day concerning delivery of the drugs (Tr. 64).

The next day, Agent Marshall, accompanied by undercover DEA Agent Ruth Beaver, again met with petitioner, Abbott, and the informant. Beaver showed a roll of money to the others; while petitioner left briefly to make a telephone call, Abbott counted it (Tr. 67-68). When petitioner returned, Beaver departed. After some intermediate stops, at which petitioner made additional telephone calls, Marshall explained to petitioner and Abbott that he would call Beaver to tell her where to bring the money after he had seen the cocaine (Tr. 69-71, 168).

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[1]Walter McMahon, Joe E. Abbott, and Steven Hudlow were indicted with petitioner. McMahon was convicted in a joint trial with petitioner and was sentenced to 12 years' imprisonment, a 10-year term of special parole, and a fine of $15,000. His conviction was also affirmed in the decision below. Abbott stood trial separately; his conviction was affirmed in an unreported decision. *United States* v. *Abbott*, 665 F.2d 352 (11th Cir. 1981) (table). The charges against Hudlow were dismissed.

Marshall, Abbott, and petitioner then drove by a circuitous route to co-defendant Steven Hudlow's apartment (Tr. 71-74, 168-170). Petitioner and Marshall went inside, while Abbott remained in the parking lot as a lookout (Tr. 73-74). Shortly thereafter, Hudlow and McMahon came to the apartment with a box. After a few minutes, petitioner called Marshall into the bedroom and showed him a bag containing approximately two pounds of white powder. Once Marshall tested the powder and determined that it was cocaine, McMahon said that their selling price was $58,000; McMahon also said that the cocaine would not leave the apartment until the money arrived (Tr. 75, 77, 155).

Marshall then telephoned Beaver and advised her that the cocaine was at the apartment. After Marshall left with Hodlow to get the money from Beaver, surveilling agents knocked on the door to the apartment and announced themselves. When they received no answer, they broke down the door and discovered petitioner and McMahon inside. McMahon indicated that the cocaine was in the bathroom; the drugs were found in a cabinet under the sink (Tr. 77, 80, 171).

b. Prior to trial, petitioner and McMahon moved to suppress the cocaine discovered in Hudlow's apartment. The district court ruled that they had "standing" to seek suppression and that the agents' search of the bathroom cabinet was illegal. On the government's appeal, the court of appeals reversed, holding that petitioner and McMahon, as visitors to Hudlow's apartment, had no expectation of privacy in the bathroom cabinet. *United States* v. *Meyer*, 656 F.2d 979, 981-982 (5th Cir. 1981).

On remand, petitioner sought to reopen the suppression hearing. Based on the magistrate's statement at the previous hearing that petitioner would be allowed to testify at the end of the proceeding if he would otherwise be found to lack

standing, petitioner argued that he had not been given an adequate opportunity to establish his standing (Pet. App. 4; Tr. 23-24). The district court declined to reopen the hearing, finding that the issue was foreclosed under the "law of the case" doctrine by the ruling on the earlier appeal (Pet. App. 4; Tr. 27).

The court of appeals affirmed. It found that the decision in the prior appeal had considered and rejected petitioner's claim that he was entitled to a further hearing on remand with respect to the issue of "standing" (Pet. App. 4).

2. Petitioner argues (Pet. 3-9) that the courts below erroneously applied the "law of the case" doctrine to preclude him from further litigating his claim that he had an expectation of privacy in Hudlow's bathroom cabinet. Petitioner's argument was correctly rejected by the district court and the court of appeals, and further review of this fact-bound issue is not warranted.

"Under the law of the case doctrine, once an issue is decided, it will not be relitigated in the same case, except in unusual circumstances." *Hayman Cash Register Co.* v. *Sarokin*, 669 F.2d 162, 165 (3d Cir. 1982). The purpose of this doctrine is to promote the "judicial system's interest in finality and in efficient administration," *Todd & Co.* v. *SEC*, 637 F.2d 154, 156 (3d Cir. 1980). See *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912); *In re Multi-Piece Rim Products Liability Litigation*, 653 F.2d 671, 678 (D.C. Cir. 1981); *Morrow* v. *Dillard*, 580 F.2d 1284, 1289 (5th Cir. 1978); *White* v. *Murtha*, 377 F.2d 428, 431-432 (5th Cir. 1967); 1B *Moore's Federal Practice* para. 0.404[1] (1983).

The "law of the case" doctrine was correctly applied here. As the court of appeals below explained (Pet. App. 4), petitioner in the earlier appeal sought a new suppression hearing on remand, and this claim was necessarily rejected

by the court's disposition of the appeal.[2] In light of that decision, the courts below properly declined, under "law of the case" principles, to reopen the suppression hearing in order to allow petitioner the relief that had been denied on the previous appeal.

Furthermore, the court of appeals correctly held in the previous appeal that petitioner lacked standing and that a remand for additional proceedings was not required because petitioner failed even to allege facts sufficient to meet his burden of establishing standing (656 F.2d at 981-982). See *Rawlings* v. *Kentucky*, 448 U.S. 98, 104 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978). Petitioner filed no motion to suppress but simply joined in the motions of his co-defendants, which did not address the issue of his standing. Prior to the testimony at the suppression hearing, the magistrate stated her understanding that petitioner claimed standing based on his presence as an invited guest in Hudlow's apartment (8/12/80 Supp. Tr. 13), and defense counsel confirmed the correctness of that understanding (*ibid.*). The government contested petitioner's standing on the ground that he had no reasonable expectation of privacy in the apartment in general or in the cabinet in the bathroom where the cocaine was found (*ibid.*). The magistrate reserved ruling on the question until the testimony had been presented (*id.* at 13-14), saying that she was "going to allow [counsel] to fully participate in the motion to suppress on [petitioner's] behalf" (*id.* at 14) and that "[a]t the end of the hearing I'll determine the standing issue as to [petitioner]" (*ibid.*). When the government emphasized that petitioner had the burden to "come forward with testimony sufficient to show that he does have standing" (*ibid.*), the

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[2]We note that on the panel below were two judges who had sat on the previous appeal, including the author of the earlier opinion.

magistrate made the following comment, which is the basis for petitioner's claim (*id.* at 15):

> I'm trying to give everyone the benefit of a maximum amount of participation, both the Government, as well as the Defendants. Obviously, when this is all over, if I believe that [petitioner] does not have standing in all or part of, I am going to give [defense counsel] notice of that effect and, then, at that time if he wishes to bring [petitioner] forward to allow [petitioner] to testify and establish his standing, I will permit him to do so.

Petitioner in fact testified in his own behalf at the suppression hearing (8/12/80 Supp. Tr. 108-124). He stated that he was in Hudlow's apartment as an invited guest (*id.* at 108, 112-113) and that at no time did he go into the bathroom where the cocaine was hidden (*id.* at 116, 118). Petitioner's testimony was not restricted by the magistrate in any way, and it neither presented nor sought to present any facts that would have supported his standing except as an invitee. Following the testimony, the magistrate indicated that she would "reserve ruling on [petitioner's] standing until I've had an opportunity to digest the testimony and look at it" (*id.* at 140); again, petitioner raised no other theory of standing and sought to introduce no additional facts. Finally, the government argued that petitioner had no reasonable expectation of privacy and therefore did not have standing (*id.* at 141-142, 154, 158), specifically referring to "the absence of any testimony to the contrary" that petitioner was without a privacy interest in the bathroom area (*id.* at 142); as before, petitioner offered no further legal arguments or facts and relied solely on his status as an invitee (*id.* at 158-159). In these circumstances, the court of appeals in the first appeal, after holding that petitioner did not have standing as an invited guest, correctly ruled that

the record did not justify a remand to reopen the suppression hearing. Petitioner's assertion that he was unfairly prejudiced by his reliance on the comments of the magistrate is unfounded.

Finally, petitioner's citation (Pet. 8) to *Combs* v. *United States*, 408 U.S. 224 (1972), does not support his position. In *Combs*, the government had not contested the defendant's standing to move for suppression, and there had been no consideration of the issue in the lower courts. Here, in contrast, the court of appeals in the previous appeal addressed the merits of petitioner's standing; and in so doing, it found that petitioner had not even alleged a sufficient basis to overcome the government's challenge to his standing and that he was not entitled to further proceedings on remand to establish his claim.[3] Compare *United States* v. *Salvucci*, 448 U.S. 83, 95 (1980) (remand on separate issue of actual standing after rejection of automatic standing in initial appeal).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

FEBRUARY 1984

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[3]Petitioner's claim (Pet. 8-9) of an intra-circuit conflict with *United States* v. *Bachner*, 706 F.2d 1121 (11th Cir. 1983), does not call for this Court's review. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, *Bachner* is not inconsistent with the decision below. In that case, the magistrate had ruled out introduction of any evidence on the question of standing, and the court of appeals remanded for the development of a factual record. Here, on the other hand, the court of appeals rejected petitioner's contention on the merits in the previous appeal, concluding from the record that there was no need to remand for further proceedings as petitioner had requested.

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